Supreme Court, U.S.
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No. 03-1071

In The Supreme Court of the United States

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY, INC.; DAVID C. JONES; and FRANCES A. KAUL,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; and SONNY J. O'NEAL, Supervisor, Okanogan National Forest,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS BRIEF OF THE CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the federal government has the authority under various federal land use statutes pertaining to management of Forest Service lands to unilaterally deprive a private party of its vested state water rights by requiring dedicated instream flows simply because the water traverses federal lands on its way toward its designated end use.

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INTEREST OF AMICUS CURIAE

Pursuant to Sup. C. R. 37.2, the California Farm Bureau Federation ("Farm Bureau") respectfully submits this brief *amicus curiae* in support of the Petition for Writ of Certiorari.[1]

Farm Bureau is a nonprofit, tax-exempt California corporation and is California's largest farm organization. Farm Bureau's membership consists of **89,000** member families in 53 county farm bureaus located throughout California. Farm Bureau is a voluntary, nongovernmental, nonpartisan organization of owners and operators of farms and ranches, as well as other residents of California who are interested in the welfare of agriculture. Farm Bureau's members grow over 250 types of crops throughout the state and contribute the majority of agricultural production in California, which saw its agricultural marketing reach $27.2 billion in 2000. Most of these family farms and ranches rely on some form of irrigation water that either originates in or flows through federal landholdings. The facts and circumstances of how water physically flows to and irrigates California farms and ranches and the regulatory and legal framework by which it does so is not identical to the facts, regulations and laws addressed in the Petitioner's case. However, if the Ninth Circuit's decision

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[1] Pursuant to Sup. C. R. 37.6, counsel for *amicus* represents that it authored this *amicus* brief, and no counsel for any party in this case authored this brief in whole or in part. Further, no entity other than *amicus*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Written consent for *amicus curiae* participation in this case was granted by counsel of record for all parties. Letters reflecting this consent have been filed with the Clerk pursuant to Sup. C. R. 37.2(a).

in this case is not overturned, the privately-held vested water rights these members rely on to maintain their agricultural operations, as well as the state of California's entire water rights system, will be thrown into chaos.

California has more than nine million acres of irrigated land, approximately eight million of which is farm land.[2] Almost half of the farmland is in the Sacramento and San Joaquin Valleys (collectively the "Central Valley").[3] The Central Valley extends 500 miles from the convergence of the Coast Range and the Sierra Nevada at Mount Shasta in the north to the Tehachapi Mountains in the south. Its average width is 120 miles and it includes more than one third of the area of California.[4] This irrigated farm land is the backbone of California's agricultural industry, which has the highest output of any state in the nation. The water that is indispensable to this irrigated agriculture comes primarily from federal, state and local projects, as well as privately owned diversion systems. These systems harness waters emanating from the Sierra Nevada and Coast Ranges that encircle the Central Valley. Given that the Sierra Nevada and Coast Ranges are predominately federally owned, a significant number of the water rights on which California's irrigated agriculture is based would be jeopardized by the Ninth Circuit's decision.

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[2] California Statistical Abstract, p. 118 (2003). The Sacramento and San Joaquin Valleys are collectively referred to as the "Central Valley".

[3] *Id.*

[4] Arthur L. Littleworth & Eric L. Garner, *California Water*, p. 19 (1995).

Of the many water projects and diversions that facilitate agriculture in California, the federal Central Valley Project ("CVP") and California State Water Project ("SWP") deliver the greatest quantity of water, with average annual deliveries of 7 million acre-feet[5] (over 75% of which is used for agriculture)[6] from the CVP and 2.5 million acre-feet from the SWP (approximately 30% of which is used for agriculture).[7] Both of these projects would likely be impacted by the Ninth Circuit's decision. The CVP consists of over 35 federally funded dams, reservoirs, and canals located in the Central Valley. The largest unit of the CVP is Shasta Dam, located in the northern end of the Central Valley below the Shasta-Trinity National Forest. Other CVP units are located on tributaries to the Sacramento and San Joaquin Rivers that originate on federal land. For example, the Folsom Dam unit of the CVP relies on flows from the American River, which originates in El Dorado and Tahoe National Forests and the New Melones unit relies on flows from the Stanislaus River, which originates in the Stanislaus National Forest.

The SWP consists of 32 dams and reservoirs and extends from the Feather River tributary of the Sacramento River to southern California. The cornerstone of the SWP is Oroville Dam on the Feather River, which originates in Plumas National Forest. Both the CVP and SWP

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[5] An acre-foot is the volume of water necessary to cover one acre of land with one foot of water. This is equal to 325,900 gallons. *Id.* at 346.

[6] United States Bureau of Reclamation, *Fact Sheet: The Central Valley Project: It's About Water* (2001).

[7] California Department of Water Resources, *Overview of the State Water Project* (2004).

utilize the Bay-Delta, where the Sacramento and San Joaquin Rivers converge as they enter the San Francisco Bay, as a conduit to pump water for delivery through the Delta Mendota Canal and California Aquaduct, respectively. Additionally, both the CVP and SWP are operated pursuant to valid rights acquired under California water rights laws. Thus, federal actions to restrict or reallocate water flowing through federal lands would destabilize these two important water projects.

Perhaps more important are the multitude of local and privately owned projects used for agricultural purposes in California that rely on water diversions on or through federal land. In fact, the initial development of California hinged on the validity of individual water diversions through federal land.

As addressed later in this brief, in the Mining Act of 1866 Congress established the keystone principle of federal policy towards state water rights; namely, the federal government would strictly respect existing state water rights, as well as the necessary rights-of-way through federal land, when managing the immense federal land holdings in the western United States. Notwithstanding the passage of time, countless water users in California still utilize ditches, flumes, and pipelines for diversion water through rights-of-way on federal land that were established over a century ago and therefore depend on the adherence to this long-standing federal policy.

In short, the water users in the Central Valley and foothills of the Sierra Nevada and Coast Range, including members of Farm Bureau, rely on the sanctity of California's water rights allocation system and the federal government's repeated promise not to disturb the exercise of

water rights through federal land. Under the Ninth Circuit's holding, the water rights on which these users depend are placed in serious jeopardy. According to the holding in *County of Okanogan v. National Marine Fisheries Service,* 347 F.3d 1081 (9th Cir. 2003), the Forest Service may, under the guise of its land use authority, reallocate water flowing through federal land, to the harm of water users, without complying with California law. The transparent circumvention of established legal precedent and existing state water rights systems is illegal and will only lead to uncertainty and disruption of important economic activities.

Since the federal government is effectively attempting to reallocate water, this case is clearly a controversy over water rights and not a controversy over legitimate management of rights-of-way on federal lands, as determined by the Ninth Circuit and the district court. Because this case is, in fact, about the interaction of federal authority with state water rights systems, the Ninth Circuit's holding jeopardizes the entire system of water law and allocation throughout its jurisdiction.

SUMMARY OF ARGUMENT

Federalism is a cornerstone of the United States Constitution. By allowing both federal and state governments to govern the same territory, the Constitution solved the problem of combining an independent local government with an effective central government. The Tenth Amendment to the Constitution reserved for the

states all powers not delegated to the federal government or prohibited by the Constitution.[8] As this Court has recognized, "[t]he situations invoking the application of these principals [comity and federalism] have contributed importantly to their formation. Just as it has been truly said that the life of the law is not logic but experience, see O. Holmes, The Common Law 1 (1881), so it may be said that the life of the law is not political philosophy but experience." *California v. United States*, 438 U.S. 645, 649 (1978). Based, in part on this dichotomy, states have generally made their own laws relating to the distribution and management of water: "The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves **in conformity with State laws and without interference with those laws or with vested rights**." *Id.* at 664 n.18 (internal citations omitted) (emphasis in original).

The primacy of state authority over water law and the allocation of water rights is well settled. In adopting the Reclamation Act of 1902 (the "Act"), Congress expressly affirmed the exclusive right of individual states over water allocation. Section 8 of the Act provides that, "[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right

[8] U.S. CONST. amend. X.

acquired thereunder. . . . "[9] 43 U.S.C. § 383. Further, this Court has consistently held that states have exclusive control over water rights. *See California*, 438 U.S. at 645; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *United States v. New Mexico*, 438 U.S. 696 (1978).

The Ninth Circuit's ruling places a dark cloud of uncertainty over private water rights for water which originates from or flows through federal lands. In light of the extensive federal land holdings present in the West,[10] this ruling will completely undermine the water law systems that currently exist throughout the states within the jurisdiction of the Ninth Circuit. The resulting chaos with respect to water distribution will negatively impact virtually every water right in these states and create general uncertainty among all water users. Farm Bureau therefore respectfully requests that this Court grant the instant petition for certiorari and restore states' exclusive rights over water.

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[9] Numerous other federal statutes contain similar language. *See, e.g.*, 43 U.S.C. § 321:

> . . . all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

(Desert Land Act of 1877).

[10] The federal government owns approximately 48 percent of California's land mass.

ARGUMENT

I. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO PROTECT STATES' AUTHORITY OVER WATER ESTABLISHED IN WELL-SETTLED WATER LAW JURISPRUDENCE

The Ninth Circuit's opinion has granted the federal government, and specifically the U.S. Forest Service ("USFS") and the National Marine Fisheries Service ("NMFS")[11] the authority to do indirectly what it cannot do directly – use federal land use laws to manage water resources that Congress reserved exclusively to the states. *See California*, 438 U.S. at 653 (noting "the consistent thread of purposeful and continued deference to state water law by Congress.") *Id.*, *see also New Mexico*, 438 U.S. at 742 ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."). As the Court noted in *California*, "[B]efore many of the Western States had been admitted to the Union, Congress deferred to the growing local law." 438 U.S. at 654. This deference is reflected in numerous federal statutes where Congress requires federal agencies to defer to state water law. *See Sporhase*, 458 U.S. at 958-59. Moreover, numerous state constitutions and statutes, including California's, contain express language asserting absolute ownership over waters in their states. *See* CAL. CONST., Art. X §§ 5 & 7; COLO. CONST., Art. 16 § 5; N.D. CONST., Art. 17 § 210; WYO. CONST., Art. 8 § 1; IDAHO CODE § 42-101 (2003).

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[11] NMFS is now the National Oceanic and Atmospheric Administration Fisheries.

The Court in *California* noted that, "Huge sums of private money were invested in systems to transport water vast distances for mining, agriculture, and ordinary consumption. Because a very high percentage of land in the West belonged to the Federal Government, the canals and ditches that carried this water frequently crossed federal land." Because of the fear that new acts like the Homestead Act of 1862 and the Mining Act of 1866 might interfere with the Water rights and systems that had grown up under state and local law, Congress explicitly recognized and acknowledged the local law:

> [W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, and other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.

§ 9, 14 Stat. 253.

As the Court noted in *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 705 (1899), this was "a voluntary recognition of a pre-existing right of possession constituting a valid claim to its continued use." Congress intended "to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition." *Basey v. Gallagher*, 87 U.S. 670 (1875).

The Ninth Circuit ignores this long-established precedent by asserting this is a case about land use authority and not water rights. *County of Okanogan*, 347 F.3d at 1086. However, the actions of USFS and NMFS

belie this assertion by requiring private vested water right holders to give up a portion of their vested water rights so more water can remain in stream for the benefit of fish, and to do so without any regard for seniority. If this case centered around land use authority, the reasonable and prudent alternatives adopted pursuant to the Section 7 consultation under the Federal Endangered Species Act ("ESA") should have only included measures affecting management of the **land** not allocation of the **water**. The federal government should not be allowed to do indirectly what it cannot do directly – reappropriate state water rights and circumvent state water law.

The Ninth Circuit's holding ignores long-established precedent and runs the risk of destroying the complex, well-established body of water law that has evolved in the West since the early 1800s. This petition for certiorari should be granted to reaffirm that states, not federal agencies, have authority over their water resources.

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO CLARIFY THE FEDERAL GOVERNMENT'S LIMITED ROLE IN WATER DISTRIBUTION

If the Ninth Circuit's ruling is allowed to stand, water uses will have to cope with competing federal and state water management authorities. This is an unworkable situation.

> A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.

California, 438 U.S. at 668-69 (characterizing exerting federal control over water as "something little less than suicidal.") *Id.* at 667. The Ninth Circuit should have heeded the words of this Court and Congress. Instead, the Ninth Circuit insists this case centers around land use authority and ignores the fact that its holding completely undermines more than 150 years of water law and will leave states and holders of vested water rights to try and sort out the confusion.

This decision would also turn California's system of water rights on its head. Under the California dual system of water rights, which recognizes both riparian and appropriative rights, the right to use water under an appropriative right depends on whether water is available for diversion under the established system of priority. Given the numerous claimants seeking to utilize this scarce resource – water – adherence to the priority system is essential. Unauthorized federal intervention into this complex system undercuts the foundation of the system for allocation of water rights: first in time, first in right. The United States Supreme Court has previously recognized the implications of such disruption. "In the arid parts of the West, . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams." *New Mexico*, 438 U.S. at 699. In times of shortages, which occur frequently in the West, water is delivered first to the holders of the most senior water rights and distributed accordingly. Further the right to actually put the water to beneficial use is the very essence of a water right. ("The right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.") Unlike other species of property

where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of value." *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313, 319 (2001) (Internal citations omitted).

In this instance the Ninth Circuit denied Petitioners the right to use their water, notwithstanding their vested water right was quite senior with a priority date of 1909, and reallocated the water by keeping it instream where other junior water right holders who are not subject to USFS regulation may use it. Reallocating water to in-stream flow as the federal government did here, "will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *New Mexico*, 438 U.S. at 705. Under the prior appropriation doctrine, whomever holds the most junior water right would be the first entity affected by the reduction. This reallocation is contrary to the doctrine of prior appropriation, renders the vested water right completely useless, and would be illegal under state water law. This is just one example of the confusion created by the Ninth Circuit's decision. The petition for certiorari should be granted to ensure that the long recognized exclusive control of water rights by individual states is adhered to by all parties regardless of whether the water at issue flows through federal lands.

III. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO ENSURE THAT FEDERAL LAND USE AUTHORITIES CANNOT BE USED TO EVISCERATE STATE WATER LAW

The Ninth Circuit's holding entitles the federal government to exert control over water resources that

originate on or flow through federal lands so long as the federal government does so under the guise of characterizing the decision as a land management decision. This is contrary to the holding in *New Mexico*, where the court made it very clear that the federal land management laws creating and governing national forests do not provide the federal government with the authority to obtain minimum instream flows for fish, independent of state law. 438 U.S. at 714-18. Any such rights must be obtained by compliance with the state's water rights system and in the same manner as any other water user. The same is true regarding the ESA. It clearly does not provide this expansive authority over state water rights.

The Ninth Circuit's attempts to distinguish this Court's holding in *New Mexico* are unpersuasive. The Ninth Circuit stated that the *New Mexico* case "did not address the power of the Forest Service to restrict the use of rights-of-way over federal land." *Okanogan County*, 347 F.3d at 1086. By arguing semantics, the Ninth Circuit ignored this Court's finding that "Congress has assured that the waters which flow through national forests **are available for use by state appropriators** by authorizing rights-of-way for ditches to carry the water to agricultural, domestic, mining, and milling uses." *New Mexico*, 438 U.S. at 713 (citing the Right-of-Way Permit Act of 1891, 43 U.S.C. § 946, *et seq.*; Right-of-Way Permit Act of 1901, 43 U.S.C. § 959; Forest Right-of-Way Act of 1905, 16 U.S.C. § 524 (repealed in part 1976)). The Ninth Circuit also ignored *New Mexico's* in-depth discussion regarding the federal government's authority under the Organic Act and the Multiple-Use Sustained-Yield Act.

This Court previously rejected the USFS's claims of authority to reserve water for the benefit of fish and

wildlife under the Organic Act and also noted that, while the Multiple-Use Sustained-Yield Act of 1960 expanded the national forests' purposes, "Congress did not intend thereby to expand the reserved rights of the United States." *New Mexico*, 438 U.S. at 711-13. Further, "there is no indication that it [Congress] believed the new purposes to be so crucial as to require a reservation of additional water. By reaffirming the primacy of a favorable water flow, **it indicated the opposite intent.**" *Id.* at 716.

> Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law. This intent is revealed in the purposes for which the national forest system was created and Congress' [sic] **principled deference to state water law in the Organic Administration Act of 1897** and other legislation.

Id. at 718.

In light of this express holding by the Court, the Ninth Circuit's decision that the USFS had the authority to seize Petitioners' vested water rights for the purported purpose of benefiting fish (*Okanogan County*, 347 F.3d at 1084-86), represents a misinterpretation of both federal statute and this Court's precedent. None of the Congressional acts that provide authority to the Forest Service repealed or otherwise modified the federal government's stated policy to respect and defer to vested state water rights, and the right to use established ditches and canals, when managing national forest lands. Rather, the Federal

Land Policy and Management Act of 1976 ("FLPMA")[12] contained an express provision stating: "Nothing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way or authorization existing on the date of approval of this Act." Thus, an act to revoke or limit a party's permit to utilize a ditch or canal on Forest Service land that existed prior to 1976 is not only without authority, but counter to express statutory provisions. The petition for certiorari should be granted in order to correctly apply both the law and legal precedent in the Ninth Circuit.

Lastly, the Ninth Circuit's ruling ignored established law that Section 7 of the ESA, 16 U.S.C. § 1536 *et seq.*, does not add to federal agencies' existing authority and therefore provides no more authority than the federal land management statutes at issue. As discussed above, these federal land management statutes do not provide the USFS with the authority to preempt water law by reallocating Petitioners' vested water rights to instream uses. Because these statutes do not contain this authority, the ESA cannot bestow this authority on the USFS through the backdoor by characterizing it as a "land management" rather than "water rights" issue.

"The ESA does not grant powers to federal agencies that they do not otherwise have." *Okanogan County*, 347 F.3d 1085. Thus, while the ESA "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its

[12] Pub.L. No. 94-579, § 701(a), 90 Stat. 2743, 2786, *reprinted in* 43 U.S.C.A. § 1701 historical note.

enabling act." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, 962 F.2d 27, 34 (D.C. Cir. 1992) (internal citations omitted). This is made clear by the regulations implementing the Section 7 consultation process. In recommending "reasonable and prudent alternatives," the alternatives are to "refer to alternative actions . . . that can be implemented . . . consistent with the scope of the Federal agency's legal authority and jurisdiction. . . . " 50 C.F.R. § 402.02 (2004). Therefore, the Section 7 consultation process does not allow the regulation of those aspects of a federally permitted project over which the agency has no authority. *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001). Further, a federal agency's mere involvement in private conduct, or the retention of discretionary control, does not confer upon a federal agency the power to regulate every aspect of a private activity. *Id.* at 1083.

The Ninth Circuit relies on FLPMA for the proposition that the USFS had the requisite authority to impose minimum instream flows as conditions to the rights-of-way permits. Their reliance is misplaced. They recognize provisions in the savings clause of FLPMA which protect vested rights existing on the date of approval of the Act but then completely ignore the fact that the exercise of the supposed authority will effectively terminate vested water rights. They justify this by focusing only on the rights-of-way and conclude that such rights-of-way are not vested land use rights. That may be true but is irrelevant and ignores the fact that one of the bundle of sticks included with a water right is its point of diversion. A portion of FLPMA's savings clause that the Ninth Circuit failed to mention reads: "[n]othing in this Act shall be construed . . .

(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public land; (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resource development or control."[13] The Petitioners in this case have vested water rights and any actions by the federal government under FLPMA are subject to these valid existing rights. These rights do not go away because the Ninth Circuit ignores them.

In light of the implementing regulations and the Ninth Circuit's own case law, the only aspect over which the federal government had any control was the maintenance of the ditch conveying Petitioners' water through federal lands. Thus, the reasonable and prudent alternatives can only be applied to land management activities. In fact, if this truly were a land management case, as opposed to a case involving water rights, the federal government should have only attempted to condition the ditch maintenance activities that may have jeopardized the listed fish species. The federal government made a fundamental error when it expanded the scope of its Section 7 consultation to include Petitioners' vested water rights because the federal government has no authority over these water rights. Rather than rectifying this error, the Ninth Circuit misinterpreted Congressional intent and long-standing precedent and compounded this error. These actions threaten the very basis of water law in all states under the Ninth Circuit's jurisdiction. Therefore, the

[13] Pub.L. No. 94-579, § 701(g), 90 Stat. 2743, 2787, *reprinted in* 43 U.S.C.A. § 1701 historical note.

petition for certiorari should be granted to correct these mistakes and respect states' primacy over water.

This restriction on the scope of federal authority does not leave NMFS without the ability to implement and enforce its responsibilities under the ESA. The Ninth Circuit would have you believe that the basis of Appellant's argument below is that compliance with the ESA was not authorized because such compliance would deny the exercise of their vested rights. After setting up this false argument they spend the rest of the opinion disagreeing with it. The argument of the Appellant's was that imposition of the instream flow requirements under the guise of Section 7 of the ESA was beyond the scope of Forest Service authority. Compliance with the ESA is a separate matter to be handled by NMFS under Section 9. Enforcement through Section 9 serves the goals of the ESA, without undermining and circumventing state water law and vested water rights. Section 9 applies to all nonfederal actions and parties, prohibits the "take" of a listed species, and is more comprehensive in its scope of protection than is Section 7. Through Section 9 the ESA can most effectively be enforced while leaving intact western water law and the entire economy of the west which, in large measure, is based on the foundation of secure, vested water rights.

CONCLUSION

Amicus Farm Bureau respectfully urges this Court to grant the petition for certiorari.

Respectfully Submitted,

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